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**PETITION FOR
A WRIT OF
CERTIORARI**

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1948

No.

LEON O. ELLARD,
Petitioner,
vs.

THE STATE OF NEW HAMPSHIRE,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of the State of
New Hampshire

PETITION FOR WRIT OF CERTIORARI

Summary Statement of Facts

On December 20, 1947, Leon O. Ellard, of Salem, in the County of Rockingham and State of New Hampshire, was convicted in the Superior Court for said County, of felony, under Revised Laws, Ch. 450, s. 28 of said State, after a plea of not guilty, by less than a legally constituted jury of twelve persons.

On December 24, 1947, in said Superior Court, after said verdict of "Guilty" was returned by said eleven persons, and before sentence, the defendant duly moved to quash and in arrest of judgment upon several grounds, among which are the following:

"And whereas, during his trial upon said indictment, the defendant having pleaded 'Not Guilty', an agreement was made by counsel in chambers without the presence, knowledge, or consent of the defendant, that the trial proceed before eleven men acting as a jury; and the defendant says that as a subject of said state he was deprived of his immunities and privileges and put out of the protection of the law in such manner as to deprive him of the judgment of his peers and the law of the land:—

"Now therefore, the defendant—respectfully moves as follows:

"(1) That said indictment be quashed as insufficient upon which to support verdict and sentence.

"(2) That sentence be arrested or deferred until such time as the constitutional rights of the defendant have been finally determined or, if an appeal be duly prosecuted by the defendant, then until further order of this Court."

The Trial Court on the 29th day of December, 1947, heard said motion of the defendant, at which time the case of Patton vs. United States, 281 U. S. 276, was presented for the consideration of the Trial Court; the motion was denied and the following finding of fact made:

"Trial commenced Thursday, December 11, 1947. Before Court opened on Monday, December 15, 1947, the Court was informed that the wife of Dennis Driscoll, one of the jurymen, had died earlier in the morning. Although Mr. Driscoll was then at the Courthouse, he was in no condition to proceed with his duties. William H. Sleeper,

counsel for the defendant, and the County Solicitor were called into chambers and informed of the facts. Both consented to proceed with eleven jurors. Shortly thereafter Court was opened and after the eleven jurymen had been seated and the defendant was seated with his attorney, Mr. Sleeper, the Court called the stenographer, counsel for the State, and William H. Sleeper, Esq., to the bench. The Court then made the following statement for the record: 'Court: The Court has been informed that the wife of Dennis Driscoll, one of the jurors serving in this case, died this morning and upon agreement of counsel, both for the State and counsel for the defendant the trial is to proceed with eleven jurors'. Mr. Sleeper said: 'Yes, our client agrees to that, defendant agrees to it'.

"The trial continued to its conclusion with eleven jurors with the consent of State's counsel, by sanction of the Court, and upon the intelligent consent of the defendant, Leon O. Ellard, expressed through his counsel, William H. Sleeper."

Opinion Below

The opinion of the Supreme Court of the State of New Hampshire rendered in this case is reported, *State v. Leon O. Ellard*, 95 N. H. —, Advance Sheet, No. 3752, dated July 6, 1948.

The Supreme Court overruled the defendant's exceptions, and said:

"The accused vigorously maintains that his constitutional rights were invaded because the case was tried in part and the verdict rendered by an eleven man jury. However, the Trial Justice found that the respondent with the Court's sanction and by agreement of his counsel and the solicitor 'intelligently' waived his right to a twelve man jury. The law is plain in this State, and we believe by the better

authority elsewhere, that this may be done. In *State v. Almy*, 67 N. H. 274, 280 it was held that a party may waive a constitutional right provided for his benefit. See also *Patton v. United States*, 281 U. S., 276 *Adams v. U. S.*, 317 U. S. 269, 277; *People v. Rabin*, and cases cited, 27 N. W. 2d., 126, 130 (Michigan Supreme Court). Annotations 70 A. L. R. 279; 105 A. L. R. 1114."

On July 16, 1948, motion for rehearing before the New Hampshire Supreme Court was filed, and on August 10, 1948, said motion was denied.

How Issues Raised

The petitioner alleges that the rulings of said State Court on motion to quash and in arrest of judgment, filed December 24, 1947, were such as to bring the case within the jurisdiction of this Court as a violation of his rights, privileges, and immunities under Amendments to the Constitution of the United States, Article 14, Sec. 1, which provides: "— nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

Jurisdiction

This Court has jurisdiction to review this cause under Section 240 of the Judicial Code, Sec. 237 (b), Act of February 13, 1925, Chapter 229, 43 Stat. 936.

Questions Presented

(1) Does the due process clause and the equal protection clause of the 14th Amendment to the Constitution of the United States require that the Trial Court in a felony case secure the express and intelligent consent of the defendant to a waiver of trial by less than a legally constituted jury?

(2) In a felony case, may a Trial Court in the State of New Hampshire sanction waiver of trial by a jury composed of less than twelve persons under Section 1 of Article 14 of the Constitution of the United States, upon agreement of both counsel for the defendant and the State, without first ascertaining that the defendant, with knowledge of his legal right not to proceed with a jury composed of less than twelve persons and after considering the advisability of doing so, has agreed to thus continue with the trial?

Reasons Relied on for Allowance of Writ.

The petitioner did not personally waive his right to trial by jury. The Trial Court did not afford the petitioner any opportunity to express personally his considered judgment on the question of continuing trial without the twelfth jurymen. The defendant did not personally declare either to his counsel, to the trial Judge, nor in open Court for the record that he waived trial by a jury of twelve. The verdict of guilty was returned by a jury consisting of a less number than a legally constituted jury.

Wherefore your petitioner prays that this petition for writ of certiorari be granted to review the decision of the Supreme Court of the State of New Hampshire.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The Defendant Was Not Present in Chambers and Was Not Aware of the Agreement to Proceed with Eleven Jurors, Being Made in Chambers by Counsel for the State and Counsel for the Defendant with the Trial Court's Permission.

The Trial Court called William H. Sleeper, counsel for the defendant, and the County Solicitor, into chambers and they were informed that the wife of Dennis Driscoll, one of the jurymen, had died earlier in the morning. Both consented to proceed with eleven jurors. (Trial Court's Finding of Fact)

The knowledge that Dennis Driscoll, the jurymen was to be excused was personal to the Trial Court. This information was first related to the County Solicitor, and to counsel for the defendant, in chambers, and at that time the agreement was made to proceed with eleven jurors.

The defendant personally could not have had any knowledge of the fact that the Trial Court intended to excuse the jurymen, nor did he have knowledge that the agreement was being made by counsel, as he was not present in chambers. The conclusion is obvious that there was no personal expression of consent to this agreement by the defendant.

Shortly after the agreement was reached in chambers, Court was opened, and the eleven man jury seated. The Court called the stenographer, defendant's counsel, and the County Solicitor to the bench and then made the statement for the record, to which counsel for the defendant expressed the defendant's agreement for him.

The defendant, personally, was not given the opportunity to express his wishes. In fact an expression of unwillingness to proceed in the presence of the remaining eleven jurymen, if not granted by the Trial Court, would unduly prejudice his case as it would lead the jury to believe he lacked faith in his defense, or in their trustworthiness. The course taken, together with the affidavit of counsel, filed upon motion to set aside, show that neither the Trial Court nor the defendant's counsel knew or had in mind the distinction between civil and criminal cases in proceeding with trial before a jury of less than twelve persons. The evidence shows that the defendant was not advised of his rights and could not have made an intelligent choice in the matter without such advice and time for consideration. At most, it can be urged that he acquiesced in the resumption of the trial, without the complete knowledge of his rights. A layman on trial for a felony could hardly be expected to insist on, or recognize his rights and privileges, which are directly inconsistent to the expressed will of the Trial Court, nor could he be expected to understand the technicalities of the procedure being followed under the direction of the Trial Court.

At no time did the Court enlighten the defendant as to his right or secure from the defendant personally an expression of his wishes with respect to resumption of the trial with only eleven jurymen,

2. The Constitution of the State of New Hampshire and the Laws of Said State Guarantee a Defendant in a Criminal Action the Right to a Trial by a Legally Constituted Jury of Twelve Persons.

New Hampshire Constitution, Part First, Article 15, "And no subject shall be arrested, imprisoned despoiled, or deprived of his property, immunities, or privileges, put out

of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

New Hampshire Revised Laws, Chapter 428, Section 15, "Any defendant in the superior court in a criminal case or other than a capital case may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court. Thereupon he shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are two or more to be tried together for the same offense, shall have exercised such election before a jury has been impanelled to try any of the defendants. In every such case the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon.

In the opinions of the Justices of the Supreme Judicial Court, 41 N. H. 550, the following question was asked of the court, by the legislature: "Has the legislature power so to change the law in relation to juries, as to provide that petit juries may be composed of a less number than twelve?" The Court answered in the negative saying: "The terms 'jury' and 'trial by jury' are, and for ages have been well known in the language of the law—A jury for the trial of a cause was a body of twelve men—who after hearing the parties,—must return their unanimous verdict upon the issue submitted to them."

By decision of the Supreme Court of the state of New Hampshire, by its laws and by its constitution, the defendant Leon O. Ellard was entitled to a trial by a legally constituted jury of twelve men.

The state of New Hampshire by its refusal to allow the defendant a trial by a legally constituted jury has deprived the defendant, Leon O. Ellard, of the equal protection of

its laws and due process of law as defined in the 14th amendment to the United States Constitution.

3. This Court Does Recognize that the Violation by a State of Rights and Privileges Embodied in the First 8 Amendments Would Be a Denial of Due Process, Where the Right and Privilege is a Violation of Those Fundamental Principles of Liberty and Justice Which Lie at the Base of All Our Civil and Political Institutions.

Under the Federal Constitution, the first eight amendments incorporated specific guarantees recognized by the founders of our federal government as fundamental rights and privileges to be protected from infringement by the sovereign state then established.

A history of the decisions of this Court reveals the gradual growth of a policy to include as violations of the due process clause any action by a state violating the rights and privileges enumerated in the first eight amendments.

In 1908, a majority of the Court decided in the case of *Twining v. N. J.*, 211 U. S. 78, that exemption from self-incrimination is not safeguarded as against state action by the due process clause of the 14th amendment, even though the 5th amendment did secure such exemption from Federal action.

The minority of the Court under Justice Harlan expressed a dissent, to the contrary, in which it was said: "Immunity from self-incrimination is protected against hostile state action, not only by that clause in the 14th amendment declaring that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' but by the clause in the same amendment, 'nor shall any state deprive any person of life, liberty, or property, without due process of law'."

In the case of *Powell v. Alabama*, 287 U. S. 45, the full Court enlarged upon the theory expounded by the minority of the Court in the earlier *Twining* case and held that a denial of counsel in a state court in a capital case was a denial of due process of law. They said "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (*Herbert v. Louisiana*, 272 U. S. 312) is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the Federal Constitution."

"The 6th amendment in terms, provides that in all criminal prosecutions the accused shall enjoy the right 'to have the assistance of counsel for his defense.' In the face of reasoning in the *Hurtado* case if it stood alone, it would be difficult to justify the conclusions that the right to counsel being thus specifically granted by the 6th amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago B. & Q. v. Chicago*, 166 U. S. 226, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the 14th amendment, notwithstanding that the 5th amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in"

Norwood v. Baker, 172 U. S. 269, 277.

Smyth v. Ames, 169 U. S. 466, 524.

San Diego Co. v. National City 174 U. S. 739, 754.

"Likewise thus, it has considered that freedom of speech and of the press are rights protected by the due process clause of the 14th amendment, although in the 1st amendment, congress is prohibited in specific terms from abridging the right."

Gethor v. N. Y., 268 U. S. 652, 666.

Stromberg v. Calif, 283 U. S. 359, 368.

Near v. Minnesota, 283 U. S. 697, 707.

"It is not because these rights are enumerated in the first 8 amendments, but because they are of such a nature that they are included in the conception of due process of law"

In the later case of Betts v. Brady, 316 U. S. 455, the court said: "The 6th amendment of the national constitution applies only to trials in federal courts. The due process clause of the 14th amendment does not incorporate, as such, the specific guarantees found in the 6th amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the fourteenth."

4. A Denial of a Trial in a Criminal Action Constitutes a Violation of the Fundamental Principles of Liberty and Justice Which Lie at the Base of All of Our Civil and Political Liberties.

In the case of Patton v. United States, 281 U. S. 276, this court discussed the question of importance of trial by jury. It was clearly indicated that the right to trial by jury in a criminal matter was one of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Speaking of trial by jury the Court said in the Patton case, p. 297:—"When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of the admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms."

At p. 312, of the Patton case:—

"Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departure from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

In the case of *Bute v Illinois* 92, U. S., p. 753 this Court held that it is permissible for a person accused of crime in a state court to waive his right to assistance of counsel, within the due process of law clause, but only, "If such waiver is to

be effective, it must be intelligently, competently, understandingly, and voluntarily made."

5. Denial of Trial by Jury, by a State, Must Be Uniformly Prescribed by Statute or Rules of Procedure.

There are instances in a state court when a person may be deprived of his right to trial by jury, such as civil matters where the problem posed is too complicated for the proper understanding of the subject by a jury, or where the denial of a right to trial by jury is uniformly denied to all litigants in the same or similar class, or category.

In *Maxwell v. Dow* 176 U. S. 581 it was said: "A state statute providing for a jury of eight, instead of twelve, persons in any criminal case not capital, does not deny the right of the defendant to due process of law, if all persons within the state are made liable to be proceeded against in the same way."

The defendant, Leon O. Ellard, was denied his right to trial by jury, as guaranteed by the constitution of the State of New Hampshire and by its statutory law (R. L. C., 423 s. 15) requiring written waiver. This denial places the defendant in a separate class and category than all other defendants in criminal matters and is a denial as to him of his right to the equal protection of the laws, as guaranteed to him under the 14th amendment.

The denial of a trial by a legally constituted jury without the defendant's express waiver of such right, is a denial as to him of due process of law as guaranteed under the 14th amendment.

Conclusion

It is respectfully urged that the questions presented are substantial, that this Court grant the Writ of Certiorari, review the cause, and make such orders as justice requires.

Respectfully submitted,

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